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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1800

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Superior Oil Company ("Superior"), petitions for a writ of certiorari to review the Judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, *The Superior Oil Company, Petitioner* v. *Federal Energy Regulatory Commission, Respondent*, is reported at 569 F.2d 971 (1978), and reproduced in Appendix A. The *per curiam* Order of the Fifth Circuit Court of Appeals denying Petitioner's Petition for Rehearing in said cause issued April 20, 1978, is unreported and is reproduced in Appendix B. The Orders of the Federal Power Commission here under review and issued on September 24,

1976 and on April 12, 1977, in *The Superior Oil Company, FPC Gas Rate No. 7*, are unreported and are reproduced in Appendices C and D.

JURISDICTION

The Opinion of the Court of Appeals for the Fifth Circuit confirming the September 24, 1976 and April 12, 1977 Orders of the Commission issued in *The Superior Oil Company, FPC Gas Rate Schedule No. 7*, was rendered on March 20, 1978 (Appendix A) and its *per curiam* Order denying Petitioner's Petition for Rehearing was entered on April 20, 1978 (Appendix B). Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED FOR REVIEW

Does the Federal Energy Regulatory Commission[1] have the authority to alter the non-rate provisions of a natural gas sales contract between a producer and its pipeline purchaser by retroactive application of a substantial modification of its established replacement contract policy?

STATUTES INVOLVED

Section 4(d), 15 U.S.C. 717c(d) and 19(b), 15 U.S.C. 717r(b), of the Natural Gas Act of 1938 (52 Stat. 821-833, as amended, 15 U.S.C. 717-717W) are involved and are

[1] Effective October 1, 1977, the Federal Power Commission (FPC) was succeeded by the Federal Energy Regulatory Commission (FERC). For convenience "FERC" or "Commission" will be used throughout this brief to refer to both Commissions. However, any reference to the period prior to October 1, 1977, relates to the Federal Power Commission, and any reference to the period beginning October 1, 1977, relates to the Federal Energy Regulatory Commission.

reproduced in Appendix E. In addition, the 1976 codification of the Commissioner's replacement contract policy, 18 C.F.R. ¶ 2.56a(a)(2)(iii) is involved and is reproduced in Appendix F. The Administrative Procedure Act, 5 U.S.C. 553 (80 Stat. 383) is involved and is reproduced in Appendix I.

FEDERAL POWER COMMISSION OPINIONS

Commission Opinions Nos. 639, 699-H, 770 and 770-A are involved and, due to the length of these opinions, only excerpts therefrom pertinent to the facts of this case are reproduced within the text of the brief.

STATEMENT OF THE CASE

I. Nature of the Case and Historical Background of the Replacement Contract Policy

This case involves a review of orders issued by the Commission rejecting a rate increase filing by Superior under the Commission's replacement contract policy. The rejection of Superior's rate filing was accomplished by a radical modification of the established policy, retroactively applied to the facts of the case, and by ignoring the plain and literal language of Superior's gas sales contract with its pipeline purchaser. In doing so, the Commission, without authority under the Natural Gas Act, effectively altered the non-rate terms of Superior's contract, which has resulted in Superior's being unlawfully deprived of nearly $6,000,000 in additional annual gas sales revenues since August 15, 1976. In order to understand the replacement contract policy under which Superior filed, it is necessary to briefly examine the history of the Commission's replacement contract policy and the purposes behind it.

Until recently, the Commission has regulated producer sales of natural gas by applying multi-tiered ceil-

ing rates to specific geographic regions of the nation. In the last few years, the nation as a whole has been used as a single pricing area. The applicable ceiling rate determination for an individual producer sale was made by reference to the date of the producer's gas sales contract and, as a general rule, the older the contract, the lower the ceiling rate. If a contract was dated prior to a certain "vintage date" established by the Commission, the gas sold thereunder was priced at the lower of a two-tiered pricing structure than gas sold under contracts dated after the vintage date. The rationale of the vintaging concept was that the price differentials of the two-tiered pricing system for a single commodity dedicated to service one market had no rational basis for the long term and it was anticipated by the Commission that these differences in price levels would be reduced and eventually eliminated as subsequent experience brought about revisions of prices in the various areas.

However, the vintaging concept was not responsive to changing market conditions of supply and demand, for it tended to discourage the development of the full productive capacity of acreage already committed to the interstate market under certificates of unlimited duration. Under the vintaging concept, the Commission, when making the ceiling rate determination, looked only to the date of the producer's base gas sales contract to determine whether it fell before or after the vintaging date. The result was anomalous for even though development drilling was undertaken subsequent to the date of the base agreement at then current costs, the additional gas production thus obtained was priced at the lower of two rates (i.e., because the date of the base gas sales agreement was prior in time to the vintaging date established by the Commis-

sion), when in fact the Commission had intended that the higher of the two prices would serve as the incentive for the development of new gas supplies.

Confronted with this historical background and aware that the nation's need for new gas supplies was ever increasing, the Commission decided to modify the two-tier pricing concept based upon an arbitrary vintage date and established its replacement contract policy in Opinion 639,[2] issued on December 2, 1972. Under this policy, the date of the replacement contract would control the determination of the ceiling rate, provided that the original or base sales contract "terminated" or "expired of its own terms". The Commission explained that it was adopting the new policy to eliminate the two-price system of vintaging with the expiration producers' base agreements and the replacement thereof by renegotiated replacement contracts and "to do so in a fashion sufficiently gradual to minimize the economic dislocation that could result from categorical rate increases for old vintage contracts."[3]

In short, the Commission recognized that the many gas sales contracts across the nation had varying periods of duration and dates of termination and that if such contracts were allowed to expire naturally (i.e., by their own terms), the overall economic effect of the higher permissible gas prices for flowing gas under the replacement contracts would be felt only gradually. Hence, it was imperative that the base contracts expire only "by their own original terms"; otherwise, gas producers and their respective purchasers might conspire to amend the original contracts

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[2] Opinion No. 639, *Area Rates For Appalachian And Illinois Basin Areas*, 48 F.P.C. 1299 (1973), *reh. denied*, Opinion No. 639-A, 49 F.P.C. 361 (1973), *aff'd sub nom. Shell Oil Co.* v. *FPC*, 491 F.2d 82 (5th Cir. 1974)

[3] *The Superior Oil Company* v. *Federal Energy Regulatory Commission*, 569 F.2d 971, 974 (1978)

so as to bring about their termination in an untimely manner in order to take early advantage of the higher rate for old gas. If the entire natural gas industry pursued this course, the Commission feared the economic shock to the nation might well be catastrophic.

II. Statement of the Facts

Here, Superior entered into its base gas sales contract with Michigan-Wisconsin Pipe Line Company ("Michigan-Wisconsin") for sales of jurisdictional natural gas from acreage in southern and offshore Louisiana on July 17, 1953. The contract did not specify a "primary term" as such, but provided in Section 3 of Article VI that "*. . . and unless terminated as elsewhere herein provided*", the contract would endure until all of the reserves committed thereunder had been delivered (and upon other conditions not pertinent to this proceeding). By amendment dated May 24, 1956, the take-or-pay obligation of the contract was extended to begin on August 15, 1956, which signaled the commencement date of the contract, and the pricing provisions of the original agreement provided for gas sales prices during the ensuing twenty-year period, and further provided that if the parties could not agree on price at the end of the fourth five-year segment of the twenty-year period, then either seller or buyer could terminate the contract upon six months' prior written notice to the other. Utilizing this provision, by letter of February 9, 1976, Superior gave notice of termination of the contract to Michigan-Wisconsin, to be effective August 15, 1976. Prior to such date but effective thereon, Superior entered into a replacement contract with Michigan-Wisconsin. On August 25, 1976, Superior filed the replacement contract with the Commission, together with the required notice of rate change.

In rejecting Superior's notice of rate change in its letter-order of September 24, 1976, the Commission declared that Superior's proposed notice of rate change was not acceptable under the vintaging concepts established either in Opinion Nos. 639 and 699-H [4] or Opinion 770 [5] in that Superior's July 17, 1953 contract had not "expired of its own terms", explaining that this proviso was interpreted to mean that the primary term of the original contract had not expired. Superior responded by filing an Application for Rehearing, pointing out to the Commission that the express terms and provisions of the original gas sales contract did not provide for a "primary term" as such, did provide for the termination of the contract in a manner "as elsewhere provided therein" (i.e. other than as set out in Section 3 of Article VI) only after the lapse of the specific twenty-year period and that the Commission had no lawful authority to alter the non-rate terms of a producer's gas sales contract.

In its Order of April 12, 1977, denying Superior's Application of Rehearing, the Commission reiterated its position that the contract had not expired of its own terms within the meaning of its replacement contract policy as stated

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[4] Opinion No. 699, *Just And Reasonable National Rates For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications Of Natural Gas To Interstate Commerce On Or After January 1, 1973*, 51 F.P.C. 2212 (1974), *reh. denied*, Opinion No. 699-H, 52 F.P.C. 1604 (1794), *aff'd sub nom. Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom. The California Co.* v. *FPC*, 44 U.S.L.W. 3716 (June 14, 1976)

[5] Opinion No. 770, *National Rates For Jurisdictional Sales Of Natural Gas Dedicated To Interstate Commerce On Or After January 1, 1973, For The Period January 1, 1975, To December 31, 1976*, Docket No. RM75-14, ... F.P.C. ..... (July 27, 1976), *reh. denied*, Opinion No. 770-A, ... F.P.C. ..... (November 5, 1976), *aff'd sub nom. The Second National Natural Gas Rate Cases*, No. 76-2000, et al. (D.C. Cir. June 16, 1977)

in Opinion 770, as amended by Opinion 770-A, inasmuch as the "primary term" (as thus designated by the Commission — not the language of the contract) had not expired and that the contract had been "prematurely terminated".

Superior disputes that the replacement contract policy as first announced by the Commission in Opinion 639 in 1972, as subsequently codified and reiterated in Opinion 699-H in 1974, and as such policy existed on February 9, 1976, the date of Superior's notice of termination (to be effective August 15, 1976, the date Superior's July 15, 1973 contract terminated), required anything more than that the base gas sales agreement terminate "by its own terms", particularly in the absence of any provision setting out a primary term as such, and in view of the existence of a specific twenty-year time span designated by the contracting parties as the contract's initial period of duration. Neither the Commission nor the Fifth Circuit Court of Appeals disputes the fact that Superior's contract terminated in accordance with its original contractual terms (i.e., unaffected by provisions of any subsequent amendment or renegotiated replacement contract) under ordinary principles of contract law. The Commission declared that even so, the termination was premature because the contract's "primary term" had not run and therefore the contract had not expired of its own terms within the meaning of the Commission's replacement contract policy as stated in Opinion 770-A,[6] issued November 5, 1976. Up until that date, there had never been any official pronouncement by the Commission that in order for a producer's renegotiated gas sales contract to qualify under the replacement contract policy, the base agreement must

[6] Id.

have run its full primary term unaffected by any alleged "premature termination provision" contained therein.

Yet the Court below viewed the Commission's language in Opinion 770-A setting forth this new and additional requirement for its replacement contract policy as neither being inconsistent nor unreasonable in view of the purposes behind the policy. The Fifth Circuit erred because the Court failed to note that the statement of the Commission in Opinion 770-A was inconsistent with all prior pronouncements of the replacement contract policy, for no previous statements had contained the "primary term unaffected by premature termination provisions" requirement, which was a substantial modification of such policy. The Court further erred because in so upholding the Commission, it permitted an inconsistent interpretation (Opinion 770-A issued November 5, 1976) of that policy to be retroactively applied to Superior's July 17, 1953 contract, which had been terminated "by its own terms" by notice of termination (Appendix H) dated February 9, 1976 (to be effective August 15, 1976).

The Court erred additionally because in confirming the Commission's position that Superior's contract had terminated under principles of ordinary contract law but had not terminated for purposes of the Commission's replacement contract policy, the Court, in effect, confers on the Commission license to alter producers' contracts by the arbitrary and capricious application of its own internal standards which have no measurable limits in contract jurisprudence. Such "license" is patently unreasonable because it would permit the Commission, as it did in this case, to alter at will the non-rate terms of gas sales contracts without authority to do so under the Natural Gas Act. As applied to this case, such a result is not only unreasonable, but irreparably and severely damaging, for it denies to Superior the benefits of the Commission's

replacement contract policy to which it is justly entitled (nearly $6,000,000 annually in additional gas sales revenues).

And finally, the Court below, after correctly noting that the purposes of the Commission's replacement contract policy were to eliminate contract vintaging and to do so in a manner sufficiently gradual to minimize the economic dislocation that could result from categorical rate increases for old vintage contracts, erred in failing to appreciate that under the facts of this case, neither Superior not Michigan-Wisconsin had "unrestricted freedom"[7] to bring themselves within the ambit of the Commission's existing replacement contract policy. For that policy (i.e., prior to the radical modification thereof in Opinion No. 770-A) required that the original gas sales agreement be terminated in accordance with its own terms, which according to such terms, could not have occurred until the lapse of a specific twenty-year period. Accordingly, the acceptance of Superior's rate schedule would not have transgressed the underlying purposes of the replacement contract policy.[8]

In fact, if all producers and their respective pipeline purchasers are bound to the terms and provisions of their original gas sales contracts, as they must be in order for those contracts to be terminated "by their own terms" for purposes of the replacement contract policy, then there is no danger, as the Commission would suggest, of wholesale termination of such agreements solely to take "premature" advantage of the higher rates provided by such policy.

For the reasons set forth above, Superior has timely filed its Petition for Writ of Certiorari to this Court for review of the Fifth Circuit Court of Appeals' decision in

[7] Fn.3, p. 974, right column.

[8] See the letter of January 17, 1978, forwarded to Chief Judge John R. Brown, at his request from Joseph G. Stiles, Attorney, Office of the Solicitor, reproduced in Appendix G.

this cause rendered March 20, 1978. However, Petitioner would point out to the Court that the importance of the review of the issue here presented is not limited just to Superior as a party litigant but pertains to the entire natural gas industry which affects, in some manner, the energy needs of every citizen of this nation. And if the regulation of that industry is to serve this nation as Congress intended, it must be by the measurable standards of ordinary principles of contract law easily identifiable in contract jurisprudence and not by amorphous standards of "premature termination" known only to the Commission.

SUMMARY OF ARGUMENT

Under the terms and provisions of the July 17, 1953 contract, Superior had the unequivocal contractual right to terminate the contract after the lapse of a specific twenty-year period, identifiable by date and year, and did so, effective August 15, 1976. Under the replacement contract policy, as it then existed, Superior's renegotiated replacement contract of August 15, 1976, was entitled to the benefits of that policy. As Superior shall point out, the Commission's failure to grant those benefits is an attempt not only to alter the non-rate terms of Superior's base gas sales contract, for which the Commission has no legal authority under the Natural Gas Act, but to do so by retroactively applying the substantial modification of its replacement contract policy which was made known for the first time in Opinion 770-A, issued on November 5, 1976.

ARGUMENT

A. Superior's July 17, 1953 Contract Expired "By Its Own Terms" On August 15, 1976.

The Court is urged to review the following pertinent language of Superior's July 17, 1953 contract with Michi-

gan-Wisconsin, which unmistakably reveals the clear intent of the parties not to be bound longer than 20 years in the absence of an additional agreement. In particular, the Court's attention is directed to Section 2 of Article XX, to-wit:

> "2. All headings appearing herein are for convenience only, and shall not be considered a part of this agreement *for any purpose* or in any way interpreting, construing, varying, *altering* or modifying this agreement or any of the provisions hereof." (Emphasis added.)

Under the directives of Section 2 of Article XX, only the language of the text of the contract itself can be considered in interpreting same.

The pertinent text of Section 3 of Article VI of the contract refers to the duration of the contract by the following language:

> "3. This agreement shall become effective on the date hereof and *unless terminated as elsewhere herein provided* shall remain effective until the reserves committed hereunder shall have been delivered or until such earlier date at which said committed reserves shall have ceased to produce in paying quantities, or until the amount of gas available to Buyer shall be so reduced that further operation of its pipe line shall in Buyer's judgment no longer be profitable to Buyer and such operation shall be permanently discontinued." (Emphasis added.)

And, the text of Sections 1 and 4 of Article XI limits the duration of the contract to an initial 20 year period by the following provisions:

> "1. During the 20 year period following the date on which Buyer is required to first take gas hereunder, the price to be paid by Buyer to Seller for each one

> thousand (1000) cubic feet of gas delivered hereunder, or for which payment is due hereunder, shall be as follows:
>
> First Five Year Period — 20.0 cents
>
> Second Five Year Period — 22.5 cents
>
> Third Five Year Period — 25.00 cents
>
> Fourth Five Year Period — 27.5 cents."
>
> "4. At least twelve (12) months prior to the expiration of the fourth five-year period referred to in Section 1 of this Article, Buyer and Seller shall attempt to agree upon the price to be paid for gas to be delivered hereunder after expiration of the fourth five-year period and in case an agreement cannot be reached which is satisfactory to both parties, either Buyer or Seller may terminate this agreement at or any time after the expiration of the fourth five-year period by giving the other party at least six (6) months notice of such termination. If this agreement shall be so terminated and the termination date shall occur after the expiration of the fourth five-year period, the price payable for gas delivered between the expiration of such five-year period and the termination date shall be the same as the price payable during the fourth five-year period."

Clearly the parties intended to be bound but for no longer than the 20-year period set out above, unless an additional agreement was reached to be so. For obvious reasons, this was not the case. In accordance with the original terms of the original agreement dated July 17, 1953, Superior exercised its contractual right to terminate under Section 4 of Article XI, which right only matured after the lapse of the 20-year period therein specified, by giving the required written notice of such termination to Michigan-Wisconsin in its letter of February 9, 1976 (Appendix H). Superior submits that therefore the contract expired by its own terms effective August 15, 1976.

B. Prior To Opinion 770-A, All Pronouncements Of The Commission's Replacement Contract Policy Required Only That The Original Gas Sales Agreement Expire "Of Its Own Terms" or "By Its Own Terms."

The Commission first announced its replacement contract policy in 1972 in Opinion No. 639.[9] In that proceeding the Commission stated that in order for a replacement contract to qualify under the policy, the base agreement must *terminate* or *expire by its own terms*. Specifically, Opinion 639 (48 F.P.C. at 1310) provided:

> "The wording of Order No. 411, and all other Commission area rate orders or opinions of similar import, stating that 'old' gas rates will be applicable to 'gas sold pursuant a contract dated prior to October 8, 1969' will be literally and strictly applied. If a gas contract dated prior to October 8, 1969, *terminates*, and the purchaser and seller enter into a new contract, gas sales under the new contract will be governed by the applicable pricing provisions relating to 'gas sold' pursuant to a contract dated after October 7, 1969.' We will, thereby, simply adhere to the plain meaning of Order No. 411, and other orders and opinions with similar language, as written. In time this will result in the elimination of a two-price system, a result we believe intended by the original authors of vintaging and a result we wholeheartedly endorse." (Emphasis supplied.)

And on rehearing (49 F.P.C. at 364):

> "In opinion No. 639, we set forth the reasons why the public interest requires an end to the continuation of the vintaging concept. We stated:
>
> '* * * Vintaging operates to discourage development of the full productive capacity of acreage committed to the interstate market, for even though such developmental drilling is undertaken at current costs, gas production obtained thereby is priced at the *lower* of two rates, when it is the *higher* of the two that is Commission-designed to provide the incentive for development of additional gas supplies.'
>
> Therefore, we have literally interpreted the language used in setting vintage rates, and have found that the wording of Order No. 411, and all other Commission area rate orders or opinions of similar import, should be literally and strictly applied. Therefore, the new gas ceiling may be applied upon execution of a new contract for deliveries of gas previously certified and dedicated to the interstate market under a contract *which has expired by its own terms*." (Emphasis in the original.)

[9] Fn. 2.

Clearly under Opinion 639 the only requirement for the replacement contract policy is that the base gas sales agreement must *terminate* or *expire by its own terms*.

In 1974, the Commission codified the replacement contract policy and made new gas sales applicable to:

> ". . . (s)ales made pursuant to contracts executed prior to or subsequent to the expiration of the terms of the prior contract when the sales were formerly made pursuant to permanent certificates of unlimited duration under such prior contracts which *expired of their own terms* on or after January 1, 1973, or pursuant to contracts executed on or after January 1, 1973, when the prior contract *expired by its own terms* prior to January 1, 1973."[10] (Emphasis added.)

This codification evolved from the following language of the Commission in Opinion 699-H[11] which issued December 4, 1978:

[10] 52 F.P.C. 1604 (1974), codified at 18 C.F.R. § 2.56a(a) (iii) (1976) (current version at 18 C.F.R. § 2.56a(a)(5)(1) (1977)).

[11] Fn. 4

By Opinion No. 639, *supra*, n. 91, the Commission announced its policy of eliminating vintaging by contract date through the vehicle of allowing the renewal contract to receive the new gas rate upon expiration of the term of the previous contract *pursuant to the provisions of the prior contract.*" (Emphasis added.)

The Court is requested to carefully note that Opinions 639 and 699-H represented the status of the replacement contract policy on February 9, 1976, the date on which Superior gave notice of its termination of the contract pursuant to the provisions of Section 4 of Article XI thereof, which notice effected such termination on August 15, 1976.

Subsequently, the Commission issued Opinion 770[12] on July 27, 1976, in which the following reference was made to the replacement contract policy:

"(4) Sales of natural gas in interstate commerce for resale may be made at a rate of 52 cents per Mcf (at 14.73 psi), exclusive of all State or Federal production, severance or similar taxes, and subject to the adjustments provided in this section 2.56a, and the escalation provided in subsection (a)(5), provided the sale is made pursuant to a contract executed prior to or subsequent to the expiration of the term of the prior contract where the sales were formerly made pursuant to permanent certificates of unlimited duration under such prior contracts which *expired of their own terms* on or after January 1, 1973, or pursuant to contracts executed on or after January 1, 1973, where the prior contract *expired by its own terms* prior to January 1, 1973." (Emphasis added.)

[12] Fn. 5

And, on November 5, 1976, the Commission issued Opinion 770-A[13] and attempted to "clarify" (but in actual effect, *to modify*) the replacement contract policy by the following language:

"It is also apparent that there is still some misunderstanding concerning what constitutes a termination of the base contract for vintaging purposes. The Commission has consistently required that the base contract must run its full 'primary term' before the expiring contract can 'rollover', and thus qualify under a replacement contract for the 52 cent rate prescribed in Opinion No. 770. *By 'primary term', we mean the actual term of years specified in the base contract, and not as the base contract may be affected by a premature termination provision contained therein* (*i.e.*, due to declining pressure or other physical conditions of the sale). Where a producer claims that its base contract has prematurely terminated, it must utilize the available special relief procedures in order to receive a higher rate, since these situations do not fall within the scope of the vintaging concepts first enunciated in Opinion No. 639 and later incorporated in Opinion No. 699-H." (Emphasis added.)

There, for the first time, appeared the requirement that the primary term of the original gas sales contract had to run the full primary term, unaffected by any so-called "*premature termination provisions*" of the contract. The addition of this new requirement represents a radical modification of all previous pronouncements of the replacement contract policy. For it permits the Commission to give weight, in its unbridled discretion, to some provisions of a contract and not to others, to take portions of the contract out of context and label one of them as the "primary term" and other termination provisions as "premature" when in fact such appellations are not warranted by the

[13] Id.

literal language of the contract. When the Commission, by all previous pronouncements of the replacement contract, required that the base agreement terminate "by its own terms" or "of its own terms", the only reasonable interpretation of this requirement is that *all* of the terms and provisions of the original agreement must be given effect under ordinary principles of contract law, which can be gleaned from and identified within known parameters of contract jurisprudence, accessible to both the regulated and the regulators, as well as the courts.

> "Settled law holds administrative agencies to compliance with their own regulations."[14]

C. Judicial And Commission Interpretations Of The Replacement Contract Policy Acknowledge That The Base Agreement Need Only Expire By Its Own Terms.

There never has been any real mystery to the vintaging concepts of Opinions Nos. 639 and 699-H. The basic rule has always been clear; i.e., in the renewal contract situation, the gas price under the renegotiated renewal contract cannot become effective until the original contract has expired in accordance with its own terms. And, as a corollary to this basic rule, it follows logically that the question of whether a contract has expired by its own terms must be determined by applying principles of ordinary contract law. *Skelly Oil Company* v. *Federal Power Commission* 532 F. 2d 177 (10th Cir. 1976).

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[14] *Service* v. *Dulles*, 354 U.S. 363, 372-373, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Bonita, Inc.* v. *Wirtz*, 125 U.S. App.D.C. 163, 167 369 F.2d 208, 212 (1966); *Elmo Division of Drive-X Co.* v. *Dixon*, 121 U.S.App. D.C. 113, 117, 348 F.2d 342, 346 (1965); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S.App.D.C. 30, 33, 269 F.2d 221, 224 (1959).

The Tenth Circuit Court of Appeals' decision in *Skelly, supra,* was rendered April 5, 1976. Under the facts of that case, the base gas sales contract between Skelly Oil Company and Lone Star Gas Company, dated May 18, 1967, called for a twenty-year primary term. Approximately ten months after the commencement date, the parties amended the original contract to provide that if gas pressures from certain properties dropped below a point which rendered further gas delivery impossible, the contract would terminate as to those properties. In 1973, the pressure from such properties did in fact drop and the parties agreed the contract had terminated as to them under the 1968 letter amendment. Lone Star, as purchaser, agreed to and did install compression facilities and the parties entered into a replacement contract. Skelly applied for a rate increase on the replacement contract theory under Order No. 699-H. The commission denied the rate increase request on the grounds that the contract had not expired by its own terms. In overturning the Commission's decision, the Tenth Circuit declared:

> "Thus we are not concerned with a subjective decision or agreement to terminate the contract as was the case in *Mobil Oil Corp. et al*, 49 FPC 234 (1973), where the parties decided to add additional acreage. In the cited case, there was a base contract with no provision for termination short of the primary term. The same may be said of the references in Opinion No. 699-H. (Opinion, P. 179, left column.)
>
> "We must conclude that the pressure clause did as a matter of contract law become operative to terminate the base contract by its own terms. . . . This is a matter of ordinary law, a Williston-Corbin problem, and, as we consider this petition, nothing more than that. *The Natural Gas Act does not alter the ordinary contractual relationships.*" (Opinion, P. 179, right column. Emphasis added.)

It is important to note, however, that in *Skelly, supra* the Court was dealing with the contractual provisions of an amendment to the base contract, which, under ordinary contract law, called for termination of the base contract *prior* to the expiration of its stated primary term by the application of an objective standard (i.e., a pressure drop) beyond the control of the parties. Acknowledging this fact, the Court there stated:

> "The FPC has not yet construed its replacement contract policy to require that all base contracts must run their full primary term regardless of provisions for termination for conditions beyond the control of the parties short of such period as here concerned." (Opinion, P. 180, left column.)

The Court's reference is, under the facts of *Skelly, supra,* to the provisions of an *amendment* to the base contract. Here we are dealing with a provision of the *base contract* which provides a method of termination that was to become operative *after,* and only *after,* the expiration of a stated twenty-year period.

In *Skelly Oil Company, Order on Remand,* FPC Gas Rate Schedule No. 228, issued February 14, 1977, *reh. denied sub nom. Getty Oil Company,* July 5, 1977, the Commission, with apparent reference to the fact that the parties were relying on a subsequent amendment to terminate the base agreement declared:

> "Thus it is clear that Skelly's rate increases filed under its FPC Gas Rate Schedule No. 228 on June 17 and August 19, 1974, and January 13, 1975, were properly rejected for the reason that the replacement contract policy does not apply with regard to the sales of this gas until the *original 1967 contract expires of its own terms.* This has not yet occurred." (Emphasis added.)

Note carefully the Commission's use of the words ". . . *until the original 1967 contract expires of its own terms.*" There remains only to examine just what these words mean.

> "The words 'terms' and 'conditions' are often used synonymously, when used in contract generally, mean the propositions, limitations, and extactions which comprise in whole or in part the agreement, and govern the contracting parties, defining what they obligate themselves to do or not to do. *Staebler-Kempf Oil Co.* v. *Mac's Auto Mart,* 45 N.W.2d 316, 318, 329 Mich. 351." 41 Words and Phrases, "Terms", p.634.

Therefore, it is inarguably clear that the words "by its own terms" and "of its own terms" in the regulations, refer to the propositions, limitations and exactions of the July 17, 1953 gas sales contract. It follows that the words ". . . *unless terminated as elsewhere herein provided*" in Section 3 of Article VI of the contract are entitled to equal constructive weight as the language that follows them, which the Commission has erroneously labeled as the Contract's "primary term".

In *Austral Oil Co.* v. *F.P.C.* 560 F.2d 1262 (5th Cir, 1977), the base agreement provided for a truly unlimited term (i.e. 20 years and thereafter until the Buyer's operation of the pipeline became unprofitable) and the producers (Austral and Amoco) sought to avail themselves of the Commission's replacement contract policy by amending their 1956 contract in 1973 so that it would terminate approximately 20 years after it was entered into. In brief, the amendment was entered into to change a truly unlimited term contract into a fixed term contract.

In upholding the Commission's rejection of the producers' rate filings, the Fifth Circuit Court of Appeals provided a very clear explanation of the replacement contract policy:

"To accomplish its purpose of eliminating vintaging in an orderly manner over a period of time, the Commission chose an objective, *mechanical formula* to determine when 'old' gas would be entitled to be treated as 'new' gas for ratemaking purposes. Recognizing that 'old' gas was being sold pursuant to contracts entered into at different times and extending for different terms, the Commission adopted a formula which tied price increases to the time that existing contracts *expired of their own terms*. Gas sold under a replacement contract would be entitled to the 'new' gas national rates only after this. In this way, the replacement contract policy envisoned bringing about a gradual phase-out of vintaging by original contract date. (Emphasis added.)

"In light of these goals, it is apparent that the Commission's holding the 'new' gas rate applicable only after the prior contract has expired of its *original* terms is a reasonable interpretation of the regulation in question. Only by attaching eligibility for replacement contract treatment to the original terms of a prior contract can the mechanical approach toward eliminating vintaging adopted by the Commission be accomplished." (Emphasis by Court.)

Note carefully the Court's reference to (and emphasis on) prior contracts which have expired of their own *original* terms to qualify for the higher rate under the Commission's replacement contract policy.

Superior agrees with the decisions in *Skelly, supra*, and *Austral, supra, provided* the four corners of the original contract reveal no definite span of time for the contract to endure, in which case the contract is truly for an unlimited term.

D. The Commission Has No Legal Authority Under The Natural Gas Act to Alter The Non-Rate Terms Of Superior's July 17, 1953 Contract.

The Commission has attempted to alter the non-rate provisions of Superior's contract by erroneously referring to it as an *unlimited term* contract. Superior submits that the only possible way to interpret its contract in such a manner is to excise from the contract the words in Section 3 of Article VI, "... *unless terminated as elsewhere herein provided*...".

It is *this* attempted alteration of the express wording of its contract to which Superior objects. For without the modifying and limiting effect of these words, the contract is, admittedly, susceptible of being interpreted as having an *unlimited term*, which is contrary to the obvious intent of the contracting parties. The net result of this alteration is sales at a rate below that approved by the Commission for replacement contracts; but this net result obtains only if the non-rate terms of the contract are altered so that the contract is changed from a fixed term to an unlimited term contract. And here again, it remains only to examine what these words mean in the contractual sense.

"The word 'unless', used in the act, is thus defined by Webster: 'Unless. Upon any less condition than the fact or thing stated in the sentence or clause which follows; if not; supposing that not; if it be not; were it not that. The Century Dictionary defines the same word as follows, omitting some secondary meanings: 'If it be not that, if it be not the case that,' etc. These definitions clearly indicate a negative condition precedent, as much so as the condition in a mortgage that, 'unless' the money is paid, or 'if it be not' paid, by a certain day, the land may be sold. If the money is paid on or before the day limited, the mortgagor is in no default whatever, and the power of sale never arises." 43A Words and Phases, "Unless", p.3.

And such is the case here, if the contract has not been terminated under Section 4 of Article XI, it would have continued as *otherwise* provided in Section 3 of Article VI.

Furthermore, the Commission's orders rejecting Superior's notice of rate change consistently refer to the language following the words ". . . *unless terminated as elsewhere herein provided* . . ." as setting out the contract's "primary term," whereas in fact the words "primary term" are not used anywhere in the contract. Thus, the reference is a misnomer, for under the express language of Section 4 of Article XI of the July 17, 1953 contract, either party, absent an additional agreement on future price, could terminate by notice *after* (and *only after*) the expiration of the fourth five-year period. Thus, the twenty-year period described in Section 1 of Article XI is the contract's initial period of duration, though never referred to as the contract's primary term; yet, it appears in the pricing provisions and price was the primary motivation for the parties to enter into the contract in the first place. Hence, Superior additionally objects to the Commission's altering the contract by labeling such language the contract's "primary term." Such unwarranted labeling is another attempt to unlawfully alter the non-rate terms of Superior's contract so as to bring the contract under the prohibition against "premature termination" contained in the Commission's modification of its replacement contract policy in Opinion 770-A, and here applied retroactively, but improperly, to Superior's contract.

In interpreting Superior's July 17, 1953 contract with Michigan-Wisconsin as an unlimited term contract, the Commission has for the very first time (at least to the knowledge of Superior's counsel) attempted to alter the non-rate terms of the original gas sales contract — unaffected by any subsequent amendment.

By comparison, in *Austral, supra,* the contract term was for "twenty (20) years and thereafter" and was properly

classified as an unlimited term contract. A subsequent amendment had been relied on by the parties to terminate the contract prior to the time it was to expire by its own *original* terms. Similarly in *Skelly, Order on Remand, supra;* the pressure drop clause terminating the original agreement was added by subsequent amendment.

The fact that Superior *voluntarily* exercised a contractual right to terminate is not significant because (1) such a contractual right only matured after the lapse of a specific twenty-year period and could not have been exercised prior to that date under the terms of the original agreement, (2) no prior statement of the Commission's replacement contract policy prohibited such termination after the lapse of a specified twenty-year period, and (3) heretofore the Commission has never required that the original contract *ipso facto* terminate for a replacement contract to qualify under its replacement contract policy.

Such arbitrary and capricious application of the Commission's policy is not only inconsistent, but also unreasonable, for though an administrative agency may be entitled to deference in interpreting its own regulations under *Udall* v. *Tallman*, 380 U.S. 1,855 ct. 792 (1965), such deference should not and cannot be used inequitably to alter the non-rate terms of Superior's July 17, 1953 contract, which, but for such alternation, would otherwise qualify under the Commission's replacement contract policy. The Commission simply has no authority under the Natural Gas Act to alter the non-rate terms of a gas sales contract.

Furthermore, the Commission's contract review authority under the Natural Gas Act is limited to a determination of whether the contract rate is just and reasonable or not and in the public interest, *United Gas Pipe Line Co.* v. *Mobil Gas Serv. Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956), and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 76 S.Ct. 368 (1968). In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S.

103, 113, 79 S.Ct. 194, 200 (1958), the Supreme Court once again reiterated this view by declaring:

> "It seems plain that Congress in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake . . . This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, . . . and *we think that it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, . . . but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review.*" (Citations omitted.)

The District of Columbia Court of Appeals neatly summarized the rule in *Richmond Power and Light, Richmond, Indiana* v. *Federal Power Commission* 481 F.2d 490 (1973) as follows:

> "The rule of *Sierra, Mobile,* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid". (Opinion 493, left column.)

Applying principles of ordinary contract law, there is no question but that the July 17, 1953 contract has expired by its own terms. Also, there is no question that the new rate applied for in the replacement contract dated August 15, 1976 is just and reasonable because it comports with the just and reasonable rate for that vintage of gas as fixed by the Commission in its Opinion 770. Therefore, Superior

has done nothing more than simply comply with its statutory duty in filing its new contract and notice of rate change and the Commission's regulations promulgated in connection therewith. The rejection of its new rate schedule by the Commission was clearly arbitrary and capricious.

E. The Commission May Not Alter Established Replacement Contract Policy By Application Of A Substantial Modification Of That Policy Retroactively.

The Commission's replacement contract policy is a creature of the Commission's making, created in response to the deficiencies of another of the Commission's policies, that of vintaging. Until the issuance of Opinion 770-A on November 5, 1976, each pronouncement of the policy had been consistent, i.e., Opinion 639, 699-H and 770, for all required that the base contract "expire by its own terms" or "of its own terms", with the emphasis being on the original contractual provisions of the base agreement, including the running of a primary term (if stated and identified as such) if, as, and when required by such provisions (i.e. where the term provisions of a contract are not modified by the words ". . . *unless terminated as elsewhere herein provided. . .*" as they are here). But upon the isssuance of Opinion 770-A, a new requirement was added by the following language:

> "It is also apparent that there is still some misunderstanding concerning what constitutes a termination of the base contract for vintaging purposes. The Commission has consistently required that the base contract must run its full 'primary term' before the expiring contract can 'rollover', and thus qualify under a replacement contract for the 52 cent rate prescribed in Opinion No. 770. *By 'primary term', we mean the actual term of years specified in the base contract, and not as the base contract may be affected by a premature termination provision contained therein (i.e., due to declining pressure or other physical conditions of the sale).* Where a producer claims that its base contract has prematurely terminated, it must utilize the available special relief procedures in order to receive a

higher rate, since these situations do not fall within the scope of the vintaging concepts first enunciated in Opinion No. 639 and later incorporated in Opinion No. 699-H." (Emphasis added.)

But Opinion Nos. 639 and 699-H make no reference whatever to the termination of the base agreement *only* by the running of a primary term unaffected by so-called "*premature termination provisions.*" This latter requirement is new and first surfaced with Opinion No. 770-A, published on November 5, 1976, some nine months after Superior gave notice of termination of the contract on February 9, 1976, pursuant to its contractual right to do so under Section 4 of Article XI of the base agreement (unaffected by the provisions of any subsequent amendment or replacement contract). Yet the Commission supports its rationale in its Order Denying Application for Rehearing issued April 12, 1977, by reference to Opinion No. 770-A. Obviously, the Commission is retroactively applying a substantial modification of its replacement contract policy to Superior's 1953 contract.

In announcing such modification, the Commission attempts to mask the new rule by declaring that it only seeks to "clarify" the policy and clear up "existing confusion." But, in fact, such reference was pointedly addressed to the pending case of *Skelly Oil* v. *FPC, supra,* which had been decided adversely to the Commission and remanded back to it by the Tenth Circuit Court of Appeals (see discussion, *supra.*). The additional requirement that a base contract must run its full primary term unaffected by other provisions of the contract is a new rule, and if applied retroactively to Superior as the Commission here seeks to do, it contravenes the Administrative Procedure Act,[15] which requires notification by a regulatory agency

[15] 5 U.S.C. 553

of intended requirements of its proposed rules. Then once a new rule is adopted, the Commission, like any other regulatory agency, must fully set forth the reasons for and the requirements of its rules before they can be affirmed. *FPC* v. *Texaco, Inc.* 417 U.S. 380, 397 (1974); *Burlington Truck Lines* v. *U.S.* 371, U.S. 156, 167-69 (1962); and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-97 (1947). Here, prior to the announcement in Opinion No. 770-A of its new requirement, the "terminate" or "expire of its own terms" criteria of the replacement contract policy meant just that — that the base contract must terminate or expire of its own terms.

CONCLUSION

In summary, the Court is asked to reconsider the March 20, 1978 decision of the Fifth Circuit Court of Appeals in this case and, in particular, to expressly find that Superior's July 17, 1953 contract with Michigan-Wisconsin is not an unlimited term contract and terminated "of its own terms" under Sections 1 and 4 of Article XI for all purposes of the Commission's replacement contract policy. In considering this issue, the Court may be aided by placing itself in the position of a banker to Michigan-Wisconsin at the time the contract was entered into. Would any responsible financial institution finance Michigan-Wisconsin for expenditures under the contract for longer than the twenty-year period set out in Section 4 of Article XI? The answer must be emphatically in the negative.

WHEREFORE, for the reasons stated herein, the Commission's Order of September 24, 1976 and April 12, 1977 rendered in this cause should be recognized as having expired by its own terms of all purposes under the Commission's replacement contract policy, and the Commission

should be directed to accept Superior's Notice of Rate Change and Renewal Contract dated August 15, 1976 by an order not inconsistent with such findings.

Respectfully submitted,

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Attorneys for
The Superior Oil Company

By .....
James M. Dunnam

CERTIFICATE OF SERVICE

The within Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel of record for the Federal Energy Regulatory Commission in accordance with Rule 33(1) of the Supreme Court Rules on or before the 20th day of June, 1978, and upon the Solicitor General of the United States in accordance with Rule 33(2)(a) of said rules by the undersigned attorney who was duly admitted to practice before the Supreme Court of the United States on June 1, 1976.

.....
James M. Dunnam
Attorney for Petitioner

Appendices

APPENDIX A

[971]

THE SUPERIOR OIL COMPANY,

Petitioner.

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 77-1851.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 20, 1978.

Natural gas producer petitioned for review of an order of the Federal Energy Regulatory Commission. The Court of Appeals, Godbold, Circuit Judge, held that: (1) under circumstance including the fact that an event entirely within the control of the contracting parties led to the producer's termination of a 1953 gas sales contract, the FERC decision that the contract had not expired of its own terms within the meaning of the FERC replacement contract policy was reasonable and consistent with the policy; (2) where the FERC decision affected only the rate at which the producer could sell its gas, the decision was within the agency's authority, and (3) the decision did not constitute an unauthorized modification of the nonrate terms of the gas sales contract.

Decision affirmed.

1. Gas § 14.3(1)

In view of purposes of Federal Energy Regulatory Commission replacement contract policy, FERC decision that natural gas producer's 1953 gas sales contract had not expired of its own terms within the meaning of the replacement contract policy was reasonable and consistent with the policy where an event entirely within the control of the contracting parties, namely, their failure to renegotiate a price term, led to the termination of the contract by the producer and where, absent that event, performance of the contract could have continued for the life of the reserves committed.

2. Gas § 14.3(1)

Insofar as Federal Energy Regulatory Commission decision that natural gas producer's 1953 gas sales contract did not expire of its own terms for purposes of the FERC replacement contract policy embodied notion that a contract does not "expire of its own terms" within the meaning of the replacement contract policy if termination of the contract results from the seller's voluntary exercise of a contractual right to terminate, decision was consistent with a reasonable interpretation of the replacement contract policy which had as its purposes to eliminate contract vintaging and to do so in a fashion sufficiently gradual to minimize economic dislocation that might result from categorical rate increases for old vintage contracts.

3. Gas § 14.3(1)

Where Federal Energy Regulatory Commission decision affected only the rate at which natural gas producer could sell its gas, effect was within the authority of the agency.

4. Gas § 14.3(1)

Where Federal Energy Regulatory Commission decision affected only the rate at which natural gas producer could sell its gas and did not bind parties to nonrate terms of either 1953 or 1976 contracts but merely concluded that rate increase contained in 1976 contract was not permitted by the replacement contract policy, the FERC decision did not constitute an unauthorized modification of the nonrate terms of a gas sales contract.

James M. Dunnam, W. B. Wagner, Jr., Gen. Counsel, Pat F. Timmons, Atty., Houston, Tex., for petitioner.

Allan Abbot Tuttle, Sol., Joseph G. Stiles, Atty., Drexel D. Journey, Gen. Counsel, FPC, Washington, D. C. for respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION.

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

GODBOLD, Circuit Judge:

The Superior Oil Company (Superior) petitions for review of an order of the Federal Energy Regulatory Commission (FERC).[1] The issue is whether the FERC erred in deciding that Superior's 1953 gas sales contract had not expired of its own terms within the meaning of the FERC's replacement contract policy. We find the FERC decision is reasonable and consistent with the replacement contract policy and affirm the Commission.

In 1953 Superior contracted to sell gas to Michigan-Wisconsin Pipeline Company. The duration of the contract was

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[1] The FERC is the successor agency to the Federal Power Commission (FPC).

limited not by years but by a number of events. The contract was to terminate, for example, at the delivery of all reserves in the subject acreage, at the failure of the acreage to produce in paying quantities, or at the inability of the buyer and seller to negotiate a new price term for gas delivered after August 15, 1976. Because the parties failed to renegotiate a price term, Superior terminated the 1953 contract as of August 15, 1976. Superior and Michigan-Wisconsin, however, successfully negotiated a new contract, which became effective on August 15, 1976, at a higher rate.

Superior submitted the 1976 contract and a notice of the related increase in rate to the FERC. The FERC accepted the rate increase. *The Superior Oil Co.*, FPC Gas Rate Schedule No. 7, letter order issued September 24, 1976, *reh. denied*, April 12, 1977. In rejecting the rate increase, the FERC reasoned:

> The original contract for this sale dated July 17, 1953, provides that the contract is effective until the reserves committed thereunder have been delivered or until such earlier date at which said reserves have ceased to produce in paying quantities or the available gas is reduced to the extent that operation of the buyer's pipe line is no longer profitable. None of the above conditions occurred and therefore, the primary term of the original contract has not expired. Accordingly, your proposed notice of change in rate is not acceptable under the vintage concepts. . . .[2]

[2] In 1954 the FPC implemented the first of a variety of plans designed to regulate the price paid to producers of natural gas. *See Shell Oil Co* v. *FPC*, 520 F.2d 1061, 1065 (CA5, 1975), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2661, 49 L.Ed.2d 394 (1976). One of these plans, implemented in 1960, established rate regulation by contract vintaging, a technique by which the permissible rate for producer gas varied with the date of execution of the gas sales contract. *See Shell Oil Co.* v. *FPC*, 491 F.2d 82 (CA5, 1974). Gas sold pursuant to Superior's 1953 contract, for example, was old vintage gas and thus was subject to a lower price ceiling than new vintage gas. In 1973 the FPC determined to eliminate gradually the contract vintaging plan. *Id. See Austral Oil Co.* v. *FPC*, 560 F.2d 1262 (CA5, 1977).

In its order denying rehearing, the FERC further noted that:

> [t]he controlling consideration is whether the 1953 contract has expired of its own terms within the meaning of the replacement contract policy. . . .
>
> We think it clear that the 1953 contract has not expired for purposes of the replacement contract policy. . . . The 1953 contract was for an unlimited term with provision for premature termination in the event the parties could not agree on future renegotiations. For vintaging purposes, it is immaterial whether premature termination occurs in accordance with a provision of the contract or wholly by subsequent agreement of the parties.

In its petition for review of the FERC order Superior claims that as a matter of contract law the 1953 contract expired by its own terms and that therefore the 1976 contract is a replacement contract within the meaning of the replacement contract policy. Superior further asserts that the FERC interpretation of the replacement contract policy constitutes an unauthorized modification of the non-rate terms of the gas sales contract.

Our initial inquiry is limited to a determination whether the FERC decision is unreasonable or inconsistent with the replacement contract policy. *Udall* v. *Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965); *Austral Oil Co., Inc.* v. *FPC*, 560 F.2d 1262, 1265 (CA5, 1977); *Shell Oil Co.* v. *FPC*, 491 F.2d 82, 88 (CA5, 1974).

The FERC's replacement contract policy was one of several methods designed to minimize the economic dislocation attendant to the elimination of contract vintaging.

See Austral Oil Co., supra. Since its inception in 1973 the replacement contract policy has been the subject of considerable explanation. As originally propounded the policy relieved producers of old vintage rates whenever "a gas contract dated prior to October 8, 1969, *terminates,* and the purchaser and seller enter . . . a new contract. . . ." Opinion No. 639, *Area Rates for Appalachian and Illinois Basin Areas,* 48 F.P.C. 1299, 1310, *reh. denied,* Opinion No. 639-A, 49 F.P.C. 361 (1973), *aff'd sub nom. Shell Oil Co.* v. *FPC,* 491 F.2d 82 (CA5, 1974) (emphasis added). In explaining this formulation, the FPC noted that "the new gas ceiling may be applied upon the execution of a new contract [replacing] a contract *which has expired by its own terms.*" 49 F.P.C. at 364 (emphasis in Opinion). In implementing the replacement contract policy the FPC has commented that "[i]n those situations where an

existing contract is renegotiated prior to termination of the contract, the termination date [of the existing contract and not] the date of the *voluntarily* renegotiated contract, is the critical factor for . . . determining the proper vintage rate." *Mobil Oil Corporation (Operator), et al.,* 49 F.P.C. 239 (1973) (emphasis added).

In 1974 the FPC codified the replacement contract policy and made new gas rates applicable to:

> [s]ales made pursuant to contracts executed prior to or subsequent to the expiration of the terms of the prior contract when the sales were formerly made pursuant to permanent certificates of unlimited duration under such prior contracts which expired of their own terms on or after January 1, 1973, or pursuant to contracts executed on or after January 1, 1973, when the prior contract expired by its own terms prior to January 1, 1973.

52 F.P.C. 1604 (1974), *codified* at 18 C.F.R. § 2.56a(a)(2)(iii) (1976) (current version at 18 C.F.R. § 2.56a(a)(5)(1)(1977)).

In explaining the policy as codified, the FPC stated that

> the base contract must run its full "primary term" before the expiring contract can "rollover," and thus qualify under a replacement contract for the [higher] rate. . . . By "primary term" we mean the actual term of years specified in the base contract, and not as the base contract may be affected by a premature termination provision contained therein (i.e., due to declining pressure or other physical conditions of the sale). Where a producer claims that its base contract has prematurely terminated, it must utilize the available special relief procedure in order to receive a higher rate, since these situations do not fall within the scope of the vintaging concepts. . . .

Opinion No. 770-A, — F.P.C. — (November 5, 1976), *aff'd sub nom. The Second Natural Gas Rate Cases (American Public Gas Association* v. *Federal Power Commission),* 180 U.S.App.D.C. 380, 555 F.2d 852 (1977).

[1, 2] In light of the foregoing statements of the replacement contract policy, and in view of its purposes, we cannot conclude that the FERC decision in this case is unreasonable or inconsistent with the replacement contract policy. The purposes of the policy are to eliminate contract vintaging and to do so in a fashion sufficiently gradual to minimize the economic dislocation that could result from categorical rate increases for old vintage contracts. In this case an event entirely within the control of the contracting parties led to the termination of the contract. Absent that event performance of the contract could have continued for the life of the reserves committed. Insofar

as the FERC decision embodies the notion that a contract does not expire of its own terms within the meaning of the replacement contract policy if termination results from the seller's voluntary exercise of a contractual right to terminate, the decision is consistent with a reasonable interpretation of the replacement contract policy. A policy that allowed contracting parties unrestricted freedom to bring themselves within its ambit could not be expected to eliminate vintaging gradually. As the court in *Austral* noted:

> The Commission knew when it adopted the replacement contract policy that existing contracts had indefinite as well as fixed term provisions. It cannot be said that the Commission acted unreasonably when it chose to frame this policy in a way that gave advantage to fixed term contracts.

560 F.2d at 1267.

[3, 4] Superior's argument that the FERC, in rejecting the rate increase of the 1976 contract, exceeded its authority by modifying the non-rate terms of a gas sales contract misconceives the effect of the FERC decision. The decision affects only the rate at which Superior can sell its gas. This effect is within the authority of the agency. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). The FERC decision does not bind the parties to the non-rate terms of either the 1953 contract or the 1976. The decision concludes only that the rate in-

[975]

crease contained in the 1976 contract is not a rate increase permitted by the replacement contract policy. Accordingly,

the FERC decision does not constitute an unauthorized modification of the non-rate terms of a gas sales contract.

The FERC decision is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1851

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION
(TEXAS CASE)

ON PETITION FOR REHEARING
(April 20, 1978)

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
J.... GODBOLD
United States Circuit Judge

APPENDIX C

In reply refer to:
BNG 222 (76-597)
The Superior Oil Company
FPC Gas Rate Schedule No. 7

The Superior Oil Company
P. O. Box 1521
Houston, Texas 77001
Attention: Pat F. Timmons, Attorney

September 24, 1976

Gentlemen:

This is with reference to your submittal on August 25, 1976, of a contract dated August 15, 1976, and a related notice of change in rate to the national rate established in Opinion Nos. 699-H and 770 for a sale of gas to Michigan-Wisconsin Pipe Line Company from acreage in Southern and Offshore Louisiana under Superior's Rate Schedule No. 7.

The contract dated August 15, 1976, is accepted for filing effective as of September 25, 1976, and has been designated as Supplement No. 28 to Rate Schedule No. 7. This acceptance is subject to the provisions of Section 154.94(c) and 154.101 of the Commission's Regulations and does not constitute any authorization that may be required under Section 7 of the Natural Gas Act. Section 154.93 of the Commission's Regulations is hereby waived to permit filing of the contract which contains an impermissible pricing provision. The granting of such waiver, however, does not constitute approval of such provision and any rate increase based on said pricing provision to the extent it is inconsistent with the provisions of Section 154.93 of the Commission's Regulations is subject to rejection.

Opinion Nos. 699-H and 770 permits the collection of the national rate for gas sold under replacement contracts

where the sales were formally made pursuant to permanent certificates of unlimited duration under prior contracts which expired *of their own terms* on or after January 1, 1973, i.e., contracts which have terminated as a result of the expiration date of its primary term. See *Mobil Oil Corp.*, Docket No. RI71-644, order issued January 17, 1973, 49 FPC 239. The original contract for this sale dated July 17, 1953, provides that the contract is effective until the reserves committed thereunder have been delivered or until such earlier date at which said reserves have ceased to produce in paying quantities or the available gas is reduced to the extent that operation of the buyer's pipe line is no longer profitable. None of the above conditions occurred and therefore, the primary term of the original contract has not expired. Accordingly, your proposed notice of change in rate is not acceptable under the vintaging concepts established in either Opinion Nos. 639 and 699-H or Opinion No. 770 and is hereby rejected. All available copies of the notice are returned herewith.

By direction of the Commission.

Lois D. Cashell
Secretary

Enclosure: Copies of Notice dated 8-23-76

cc. Michigan-Wisconsin Pipe Line Company
One Woodward Avenue
Detroit, Michigan 48226

Michigan-Wisconsin Pipe Line Company
Suite 1610 Post Oak Tower
5051 Westheimer
Houston, Texas 77027

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

INDEPENDENT PRODUCER (Rates)
CONTRACTS (Replacement Policy)
RATES (Vintaging)

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

The Superior Oil Company
FPC Gas Rate Schedule No. 7

ORDER DENYING APPLICATION FOR REHEARING
(Issued April 12, 1977)

Nature of Proceedings. On August 25, 1976, Superior Oil Company (Superior) filed a contract dated August 15, 1976, and a related notice of change in rate to the national rate established in Opinion Nos. 699-H[1] and 770,[2] 52 cents per Mcf at 14.73 psia, plus adjustments, for a sale of gas to Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin) from acreage in onshore and offshore Louisiana under Superior's FPC Gas Rate Schedule No. 7. By letter order of September 24, 1976, the Commission (1) accepted for filing as Supplement No. 28 to Superior's Rate Schedule No. 7 a renegotiated contract for the sale and purchase of this gas by the same parties (with an express reservation regarding an impermissible pricing provision), and (2)

---

[1] *Opinion And Order On Rehearing Affirming In Part And Modifying In Part Opinion No. 699 . . .*, Docket No. R-389-B, issued December 4, 1974.

[2] *Opinion And Order Prescribing Uniform National Rate For Sales Of Natural Gas . . .*, Docket No. RM75-14, issued July 27, 1976.

rejected the notice of change in rate on the ground that the original 1953 contract covering such sale had not expired by its own terms.

On October 12, 1976, Superior filed an application for rehearing of the above letter order insofar as it rejected Superior's rate increase filing. On November 8, 1976, the Commission granted Superior's application for rehearing for the purpose of affording further time for consideration thereof.

Background. From commencement of deliveries under Superior's Rate Schedule No. 7 pursuant to the original contract dated July 17, 1953, and thereafter until 1976, the gas sale involved in this proceeding was made pursuant to the original contract. The term of this contract was set forth in Article VI thereof, paragraph 3, and reads as follows:

> This agreement shall become effective on the date hereof and unless terminated as elsewhere herein provided shall remain effective until the reserves committed hereunder shall have been delivered or until such earlier date at which said committed reserves shall have ceased to produce in paying quantities, or until the amount of gas available to Buyer shall be so reduced that further operation of its pipe line shall in Buyer's judgment no longer be profitable to Buyer and such operation shall be permanently discontinued.

Another provision of the contract, Article XI, Section 4, states:

> At least twelve (12) months prior to the expiration of the fourth five-year period referred to in Section 1 of this Article, Buyer and Seller shall attempt to agree upon the price to be paid for gas to be delivered hereunder after expiration of the fourth five-year period and in case an agreement cannot be reached which is satisfactory to both parties, either Buyer or Seller may terminate this agreement at or any time after the

> expiration of the fourth five-year period by giving the other party at least six (6) months notice of such termination. If this agreement shall be so terminated and the termination date shall occur after the expiration of the fourth five-year period, the price payable for gas delivered between the expiration of such five-year period and the termination date shall be the same as the price payable during the fourth five-year period.

Superior maintains that it terminated the 1953 contract pursuant to Section 4, Article XI, by its letter of February 9, 1976, to Michigan-Wisconsin which stated, in pertinent part, as follows:

> Reference is made to . . . [Section 4 of Article XI of the 1953 contract] which provides, in part, that absent agreement on the price to be paid for gas to be delivered under the Contract after the expiration of the fourth five-year period, either party may terminate the Contract at or any time after the expiration of the fourth five-year period by giving the other party at lease six (6) months' notice of such termination.
>
> Pursuant to the provisions of said Section 4, Superior hereby exercises its right to terminate the Contract as of August 15, 1976, the expiration of the fourth five-year period.

On August 15, 1976, Superior and Michigan-Wisconsin entered into the previously mentioned new contract covering the same sale of gas to replace the 1953 contract. The replacement contract provides for a price of $1.42 per Mcf, plus adjustments, with a one cent annual escalation, and contains a clause permitting Superior to charge a rate as high as any area, national, or other designated rate permitted by the Federal Power Commission in the area in which the producing properties are located.

Discussion and Conclusion. We find it unnecessary to discuss whether the above-mentioned letter of February 9,

1976, was legally sufficient to terminate the 1953 contract as a matter of ordinary contract law. The controlling consideration is whether the 1953 contract has expired of its own terms within the meaning of the replacement contract policy, stated in Opinion No. 770, as amended, as follows:

> Sales of natural gas in interstate commerce for resale may be made at a rate of 52 cents per Mcf (at 14.73 psia), exclusive of all State or Federal production, severance or similar taxes, and subject to the adjustments provided in this Section 2.56a, and the escalation provided in subsection (a)(6), provided the sale is made pursuant to (A) a replacement contract where the sale was formerly made pursuant to a permanent certificate of unlimited duration under such prior contract which expired by its own term on or after January 1, 1973, or pursuant to a contract executed on or after January 1, 1973, where the prior contract expired by its own terms prior to January 1, 1973; . . .

We think it clear that the 1953 contract has not expired for purposes of the replacement contract policy. In Opinion No. 770-A, issued November 5, 1976, we stated at p. 22:

> The Commission has consistently required that the base contract must run its full "primary term" before the expiring contract can "rollover," and thus qualify under a replacement contract for the 52 cent rate prescribed in Opinion No. 770. By "primary term," we mean the actual term of years specified in the base contract, and not as the base contract may be affected by a premature termination provision contained therein. . . .

The 1953 contract was for an unlimited term with provision for premature termination in the event the parties could not agree on future price renegotiations. For vintaging purposes, it is immaterial whether premature termination occurs in accordance with a provision of the contract or wholly by subsequent agreement of the parties. *Skelly Oil Company, Order On Remand,* FPC Gas Schedule No. 228, issued February 14, 1977; *Austral Oil Company, et al., Order Denying Applications For Rehearing,* FPC Gas Rate Schedule Nos. 9 and 23, issued August 3, 1976.

Superior requests in the alternative that the Commission set this matter for hearing or for consideration by counsel for Superior and the Commission Staff to stipulate a factual record upon which a petition for review can be based. We believe such procedures are unnecesary; neither are they available to Superior as a matter of right. Under Paragraph 2.56(h) of Ordering Paragraph (A) of Opinion No. 749,[3] as amended, Superior was not entitled to file for any rate in excess of the rate ceiling authorized thereunder unless it was entitled to the replacement contract rate. Since the sale here involved does not come within the replacement contract policy, Superior was not entitled to file for the rate proposed by it, and its rate filing was properly rejected. *Mobil Oil Corp.*, v. *FPC*, 469 F2d 130 (1972), *cert. den.*, 412 U.S. 931. An evidentiary type hearing would be unnecessary in a proceeding such as this where matters of law only are involved and all documents necesary to its disposition — the rate schedule and the relevant Commission order — are on file with the Commission and are matters of public record. In rejecting a claimed absolute right of hearing under Section 4(e) of the Natural Gas Act by a party objecting to a settlement agreed to by all other parties, the Court said in *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F2d 1242, 1251 (CADC 1972).

In the event no factual controversy exists here, however, no hearing is required. In the case at bar, we find

---

[3] *Just And Reasonable National Rates For Sales Of Natural Gas From Wells Commenced Prior To January 1, 1973,* Docket No. R-478, issued December 31, 1975.

no possible dispute over the facts, since the Commission accepted all of Penn Gas' *factual* allegations as correct.

In the above connection see also the *Austral* order cited above.

Superior's application for rehearing presents no new facts or principles of law which warrant any modification of the Commission's order rejecting its rate increase filing.

The Commission finds:

The application for rehearing filed by Superior should be denied.

The Commission orders:

Superior Oil Company's application for rehearing filed October 12, 1976, concerning rejection of its rate increase filed on August 25, 1976, in its FPC Gas Rate Schedule No. 7 is hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX E

NATURAL GAS ACT
15 U.S.C. 717-717W

§ 717c. Rates and charges; schedules; suspension of new rates

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

§ 717r. Rehearings; court review of orders

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by

the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

APPENDIX F

18 C.F.R. 2.56a (a)(2)(iii)

Sales made pursuant to contracts executed prior to or subsequent to the expiration of the term of the prior contract where the sales were formerly made pursuant to permanent certificates of unlimited duration under such prior contracts which expired of their own terms on or after January 1, 1973, or pursuant to contracts executed on or after January 1, 1973, where the prior contract expired by its own terms prior to January 1, 1973.

APPENDIX G

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D. C. 20426

January 17, 1978

Chief Judge R. Brown
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: *Superior Oil Co.* v. *FERC*,
No. 77-1851 (5th Cir.)

Dear Chief Judge Brown:

This is in response to your request at oral argument in the captioned proceeding on December 1, 1977. You asked that I check at the Commission as to whether there are any pending cases in which the Commission rejected gas producer rate increases under its replacement contract policy as it did in the captioned proceeding.

That inquiry has been completed, and I can state that there are no other pending cases before the Commission or the courts where the Commission has rejected a gas producer rate increase under its replacement contract policy where the contract was terminated pursuant to a contractual provision prior to the expiration of the term in the original contract. The only possible exception is *Getty Oil Co.* v. *FERC*, No. 77-1993 (10th Cir.), involving the Commission's Order On Remand in *Skelly Oil Co.*, FPC Gas Rate Schedule No. 228, issued February 14, 1977. In that case, the contract was terminated prior to the expiration of the term of the original contract pursuant to a low pressure amendment. The Commission's order there was discussed in detail in our brief in this case at pp. 14-16.

During oral argument, I suggested that if the Court decided against the Commission in the captioned proceeding, other gas producers would take advantage of that decision and would attempt to terminate their contracts, pursuant to any available contractual provisions prior to the expiration of the term in the original contract, so that replacement contracts could be executed and filings could be made seeking the replacement contract rate. The fact that there are no such rate increase filings presently at the Commission or in the courts does not invalidate the argument, for such filings would presumably only be made following a decision adverse to the Commission in the captioned proceeding.

Furthermore, there are only two cases currently in the courts involving Commission orders issued under its replacement contract policy. The first, as noted *supra*, involves the Commission's Order On Remand in *Skelly Oil Co.*, FPC Gas Rate Schedule No. 228, iissued February 14, 1977, *reh. denied sub nom. Getty Oil Co.* (Skelly's successor), July 5, 1977. As noted at oral argument, Getty Oil Company appealed those orders in *Getty Oil Co.* v. *FERC*, No. 77-2870 (9th Cir. Aug. 16, 1977). The Ninth Circuit granted the parties' motion to transfer the case to the Tenth Circuit by order issued November 23, 1977. The Tenth Circuit docketed the appeal on November 30, 1977, as No. 77-1993. The procedural schedule in that case calls for the petitioner's brief to be filed February 27, 1978, the Commission's brief to be filed March 29, 1978, and the Joint Appendix to be filed April 24, 1978.

The second pending court case involving a Commission order issued under its replacement contract policy is *Aztec Oil & Gas Co.* v. *FERC*, No. 77-1580 (5th Cir.). The petition for review was filed on March 18, 1977. By order issued May 3, 1977, this Court granted a motion to hold the proceeding in abeyance pending a decision in *Austral Oil Co.*,

et al. v. *FERC*, Nos. 76-3647, *et al.* (5th Cir.). The Commission noted this information in its brief in the captioned proceeding at p. 17, n. 12. Because of this Court's decision (issued October 14, 1977, *reh. denied*, November 14, 1977) affirming the Commission's orders in *Austral*, Aztec Oil & Gas Company submitted on December 30, 1977, a motion to dismiss the appeal.

With respect to cases pending before the Commission involving the Commission's replacement contract policy, there are currently a number of routine filings seeking the replacement contract rate. In each such case, the term of the original contract has expired. Such filings would not seem to present any problems, and letters accepting the replacement contracts for filing and authorizing the replacement contract rates should, therefore, be mailed in due course. The Commission has not rejected any gas producer rate increase under its replacement contract policy within the past five months. The only exception involves The Superior Oil Company which submitted a new contract together with a notice of rate change to replace the existing contract which it had executed in the captioned proceeding as a replacement contract and which had a one-year term. As it had done previously, the Commission issued an order on November 16, 1977, which accepted the new contract for filing but rejected the proposed replacement contract rate because the term of the original contract had not expired.

One other case is relevant involving Natural Gas Pipeline Company of America (Natural), which on November 22, 1977 filed a petition for a declaratory order pursuant to Section 1.7(c) of the Commission's regulations, 18 C.F.R. § 1.7(c). Natural assertedly filed the petition in order to obtain a resolution of a controversy in which Gulf Oil Corpotion (Gulf) claimed the replacement contract rate for a sale of gas to Natural, while Natural believed that Gulf was only entitled to the flowing gas rate, the level at which Gulf was

making payments to Natural. Gulf and Natural had entered into a contract for the sale of gas on January 23, 1956, for a term of 20 years and thereafter until cancelled by either party upon 60 days' written notice. On January 28, 1972, Gulf and Natural amended the contract to include a life-of-lease term. On August 11, 1976, Gulf filed a notice of rate change in an effort to obtain the replacement contract rate. The Commission by subsequent letter authorized the higher rate. The Commission issued notice of Natural's November 22, 1977 petition (Docket No. RI78-18) on December 13, 1977, with protests due on or before January 4, 1978. On January 3, 1978, Gulf filed a petition to intervene. The Commission has not yet acted on Natural's petition.

I apologize if the delay in responding to your request has in any way inconvenienced the Court. If any additional information is needed by the Court, the Commission will be happy to provide it.

Respectfully,

Joseph G. Stiles
Attorney
Office of the Solicitor

cc: James M. Dunnam,
Counsel for The Superior Oil Company

APPENDIX H

February 9, 1976

CERTIFIED MAIL

Michigan Wisconsin Pipe Line Company
1610 Post Oak Tower, 5051 Westheimer
Houston, Texas 77027

Attention Mr. J. J. Jamison

Gentlemen:

Gas Sales Contract
Dated July 17, 1953, as amended

Reference is made to the captioned Gas Sales Contract between Michigan Wisconsin Pipe Line Company (successor thereunder to American Natural Gas Company) and The Superior Oil Company and in particular to Section 4 of Article XI, PRICE, which provides, in part, that absent agreement on the price to be paid for gas to be delivered under the Contract after the expiration of the fourth five-year period, either party may terminate the Contract at or any time after the expiration of the fourth five-year period by giving the other party at least six (6) months' notice of such termination.

Pursuant to the provisions of said Section 4, Superior hereby exercises its right to terminate the Contract as of August 15, 1976, the expiration of the fourth five-year period.

We would appreciate receiving for our consideration a form of replacement contract which you would propose to

cover this sale and purchase upon expiration of the captioned Contract.

Very truly yours,

THE SUPERIOR OIL COMPANY

J. L. NORMAN
J. L. Norman
Senior Vice President

cc: Michigan Wisconsin Pipe Line Company
One Woodward Avenue
Detroit, Michigan 48226

APPENDIX I

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

Supreme Court, U.S.
FILED
SEP 5 1978
MICHAEL RODAK, JR., CLERK

No. 77-1800

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,

STEVEN A. TAUBE,
JOSEPH G. STILES,
Attorneys,
Federal Energy Regulatory Commission,
Washington, D.C. 20426.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1800

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 569 F.2d 971. The orders of the Commission (Pet. App. C, D) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-1) was entered on March 20, 1978, and its order

denying a petition for rehearing was entered on April 20, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on June 20, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly rejected a rate increase filed by petitioner as inconsistent with the Commission's replacement contract policy.

STATEMENT

1. Under the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, the Commission has the authority to regulate the rates charged by producers for sales of natural gas for resale in interstate commerce. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

In 1960, the Commission adopted a rate-making technique that priced gas at different rates on the basis of the date of the sales contract. Under this program, known as "vintaging," gas produced under contracts signed before an established "division" date was set at one price as "old" gas, while gas produced under contracts signed after the division date was allowed a higher price as "new" gas. *Statement of General Policy No. 61-1*, 24 F.P.C. 818.

In 1973, in Opinion Nos. 639, 48 F.P.C. 1299, and 639-A, 49 F.P.C. 361, affirmed *sub nom. Shell Oil Co.* v. *Federal Power Commission*, 491 F.2d 82 (C.A. 5), the Commission initiated its replacement contract pol-

icy. This policy was designed gradually to eliminate vintaging. To minimize the economic dislocations that would result if all "old" gas were suddenly allowed to be sold at the higher rates, the replacement policy permits gas sold under a new contract to be treated as new gas if the new contract replaces a prior contract (signed before the division date) that has expired by its own terms.[1] Thus, over time, "old" gas would gradually disappear. 48 F.P.C. at 1310, 49 F.P.C. at 364.

Thereafter, the Commission refined this policy in individual cases and through the promulgation of specific regulations. In 1973, in *Mobil Oil Corp.*, 49 F.P.C. 239, the Commission held that where a contract was renegotiated prior to the termination of the original contract, the replacement contract policy was inappropriate until the original contract had expired. In 1974, the Commission codified the replacement contract policy in the Commission's regulations (18 C.F.R. 2.56a(a)(2)(iii) (1976) (as revised, now appearing at 18 C.F.R. 2.56a(a)(5)(i) (1977)). See

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[1] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, established that once gas reserves are dedicated to interstate commerce under an unlimited certificate, the expiration of a gas sales contract does not authorize the abandonment of that service; the Commission may still require the continuation of the service at Commission-established rates. In establishing its rate structure, however, the Commission may take the expiration of contracts into account. It may, as it has in its replacement policy, make such expirations relevant in determining the vintage of gas.

Opinion No. 699-H, 52 F.P.C. 1604.[2] The Commission reaffirmed that, in order to avoid "severe and harmful economic dislocations," vintaging would be gradually phased out. 52 F.P.C. at 1638 n. 118. Later, the Commission disallowed a proposed replacement contract rate where the parties to a contract had executed an amendment reducing its term and then entered into a new contract replacing the foreshortened original contract. *Austral Oil Co.*, F.P.C. Gas Rate Schedule Nos. 9 and 23, and *Amoco Production Co.*, F.P.C. Gas Rate Schedule No. 190, letter orders (April 30, 1976), rehearing denied (August 3, 1976).[3] Moreover, in Opinion No. 770-A, issued November 5, 1976,[4] the Commission explained (slip op. 22) that under this policy "the base contract must run its full 'primary term' before the expiring contract can 'roll-over,' and thus qualify under a replacement contract for the [higher] rate," and that "[b]y 'primary term'," it "mean[t] the actual term of years specified in the base contract, and not as the base contract may be affected by a premature termination provision contained therein * * *" (Pet. 17; Pet. App. D-4).[5]

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[2] Affirmed, *Shell Oil Co.* v. *Federal Power Commission*, 520 F.2d 1061 (C.A. 5), certiorari denied *sub nom. California Co.* v. *Federal Power Commission*, 426 U.S. 941.

[3] Affirmed, *Austral Oil Co., Inc.* v. *Federal Power Commission*, 560 F.2d 1262 (C.A. 5).

[4] Affirmed *sub nom. American Public Gas Ass'n*, 555 F.2d 852 (C.A. D.C.), certiorari denied February 28, 1978 (No. 77-695).

[5] See also *Skelly Oil Co.*, Order on Remand (February 14, 1977), rehearing denied *sub nom. Getty Oil Co.*, No. 77-1993 issued July 5, 1977, appeal pending, *Getty Oil Co.* v. *Federal Energy Regulatory Commission* (C.A. 10, No. 77-1993).

2. In 1953, petitioner, a producer of natural gas, entered into a contract with a predecessor to Michigan-Wisconsin Pipe Line Company for the sale of gas in interstate commerce. The contract provided for an indefinite term and was to remain effective until delivery of all reserves in the committed acreage, failure of the acreage to produce in paying quantities, or reduction in the amount of gas available to the purchaser to the extent that operation of its pipeline would no longer be profitable (Pet. App. A-4). The contract also provided for premature termination if the parties were unable to negotiate a new price for gas delivered after August 15, 1976 (*ibid*). Pursuant to this last provision, petitioner terminated the original contract as of August 15, 1976, and entered into a new contract with Michigan-Wisconsin effective on August 15, 1976, which provided for a higher price (*ibid.*).

On August 23, 1976, petitioner filed a proposed rate increase with the Commission requesting the replacement contract rate specified in Commission Opinion No. 770. The Commission rejected the proposed rate increase on the grounds that the primary term of the original contract had not expired (Pet. App. C). The Commission denied rehearing and further explained that the original contract had not expired of its own terms within the meaning of the Commission's replacement contract policy, because under that policy a replacement contract rate is not available when a contract was prematurely terminated either by a pro-

vision of the contract or by subsequent agreement of the parties(Pet. App. D).

The court of appeals affirmed the Commission's orders (Pet. App. A). It held that the Commission's decision was reasonable and consistent with the replacement contract policy. The court determined that insofar as the Commission's decision embodies the notion that a contract does not expire of its own terms for purposes of the replacement contract policy if termination results from the seller's voluntary exercise of a contractual right to terminate, the decision is consistent with a reasonable interpretation of that policy. The court found "[a] policy that allowed contracting parties unrestricted freedom to bring themselves within its ambit could not be expected to eliminate vintaging gradually" (Pet. App. A-7 to A-8). The court also held that the Commission had not altered the non-rate terms of petitioner's gas sales contract, but had only determined the proper rate at which petitioner could sell its gas, a function within the authority of the Commission (Pet. App. A-8).

ARGUMENT

The court of appeals correctly held that the Commission's rejection of the proposed rate increase was consistent with the Commission's replacement contract policy and within the scope of the Commission's authority. The decision below presents no issues of general importance, raises no conflict with other decisions and does not warrant this Court's review.

1. Petitioner errs in contending (Pet. 11-12) that the replacement contract policy applies whenever a contract expires pursuant to any provision in it, including those that effectively permit one or both of the parties to terminate the contract unilaterally or by agreement. The Commission held otherwise and that holding is consistent with its decisions and orders in other cases. See pages 3-4, *supra*.[6] Absent clear evidence of irrationality or arbitrariness, the Commission's consistent interpretation of its own policy should be honored. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16-17.

Moreover, as the court of appeals recognized, and contrary to petitioner's claim (Pet. 17-18), the Commission's conclusion that replacement contract rates are not triggered by terminations resulting from unilateral or bilateral conduct of the parties is not only reasonable but also essential to the purpose of the replacement contract policy, which was to avoid the sudden and complete elimination of old gas rates. As the court of appeals stated (Pet. App. A-7 to A-8):

> The purposes of the policy are to eliminate contract vintaging and to do so in a fashion suffi-

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[6] Petitioner's claim (Pet. 14-18) that the policy applied to this case was first established in November 1976, in Opinion No. 770-A, and applied retroactively to petitioner's termination in August 1976, is incorrect. The policy applied here and announced in Opinion 770-A was in accord with principles stated in 1973 in *Mobil Oil Corp.*, 49 F.P.C. 239 and applied to other companies before petitioner's termination. See pages 3-4, *supra*. As noted in the text, it is also implicit in the purpose of the replacement contract policy.

ciently gradual to minimize the economic dislocation that could result from categorical rate increases for old vintage contracts. In this case an event entirely within the control of the contracting parties led to the termination of the contract. Absent that event performance of the contract could have continued for the life of the reserves committed. Insofar as the FERC decision embodies the notion that a contract does not expire of its own terms within the meaning of the replacement contract policy if termination results from the seller's voluntary exercise of a contractual right to terminate, the decision is consistent with a reasonable interpretation of the replacement contract policy. A policy that allowed contracting parties unrestricted freedom to bring themselves within its ambit could not be expected to eliminate vintaging gradually.[7]

---

[7] *Skelly Oil Co.* v. *Federal Power Commission*, 532 F.2d 177 (C.A. 10), on which petitioner relies (Pet. 18-21), is inapposite. The court of appeals' decision in *Skelly* was based on the fact that the prior contract had terminated because of facts beyond the control of the parties—loss of gas pressure—and the court on that basis distinguished the Commission's earlier decision in *Mobil Oil Corp.*, 49 F.P.C. 234 (532 F.2d at 179-180). Here, in contrast, the prior contract was purportedly terminated by the voluntary and unilateral action of petitioner. As the Commission and the court below noted, to permit replacement contract rates on the basis of such actions would vitiate the purpose of the replacement contract policy.

Moreover, in *Skelly*, the court of appeals left open the question whether the Commission could require that all base contracts must run their full primary terms for replacement contract purposes, regardless of provisions for termination resulting from conditions beyond the control of the parties, since the Commission had not based its decision on that theory (532 F.2d at 180). On remand the Commission again denied the replacement contract rate expressly on that theory (*Skelly Oil Co.*, Order On Remand, February 14, 1978, see also Order No. 770-A, page 4, *supra*), and that decision is pending on appeal. *Getty Oil Co.* v. *Federal Energy Regulatory Commission* (C.A. 10, No. 77-1993). Whether or not the Tenth Circuit will affirm that theory is immaterial since this case involves a termination within the control of the parties and therefore does not depend on that theory.

2. Petitioner contends that the Commission exceeded its authority by modifying the non-rate terms of its original gas sales contract when it found that the contract provided for an unlimited term (Pet. 23-27). The court of appeals correctly rejected that contention (Pet. App. A-8):

> Superior's argument that the FERC, in rejecting the rate increase of the 1976 contract, exceeded its authority by modifying the non-rate terms of a gas sales contract misconceives the effect of the FERC decision. The decision affects only the rate at which Superior can sell its gas. This effect is within the authority of the agency. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 * * *. The FERC decision does not bind the parties to the non-rate terms of either the 1953 contract or the 1976. The decision concludes only that the rate increase contained in the 1976 contract is not a rate increase permitted by the replacement contract policy.

Moreover, the Commission's authority to require the continuation of dedicated service at Commission rates notwithstanding the terms of a private contract is well established. *California* v. *Southland Royalty Co.*, No. 76-1114, decided May 31, 1978; *Sunray Mid-*

Continent Oil Co. v. *Federal Power Commission*, 364 U.S. 137.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT R. NORDHAUS,
General Counsel,

STEVEN A. TAUBE,
JOSEPH G. STILES,
Attorneys,
Federal Energy Regulatory Commission.

SEPTEMBER 1978.

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Supreme Court, U. S.
FILED
SEP 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1800

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITIONER'S MOTION TO SUPPRESS AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THE SUPERIOR OIL COMPANY
W. B. WAGNER, JR.
General Counsel
JAMES M. DUNNAM
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Attorneys for
The Superior Oil Company

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No. 77-1800

THE SUPERIOR OIL COMPANY,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITIONER'S MOTION TO SUPPRESS AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

COMES NOW, The Superior Oil Company ("Superior"), Petitioner herein, and files herewith its Motion to Suppress and, in the alternative, its Reply to the Brief in Opposition filed in this proceeding by the Federal Energy Regulatory Commission ("Commission"), Respondent herein. In the interest of brevity, Superior adopts by reference its statement of the case contained in its Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit previously filed herein on June 20, 1978.

MOTION TO SUPPRESS

Under Rule 24[1] of the Rules of the Supreme Court, when any agency of the United States is the named re-

[1] Reproduced as Appendix "A" hereto.

spondent in a Petition for Writ of Certiorari filed in this Court, the time period for filing a Brief in Opposition thereto is automatically extended twenty days beyond the usual thirty days provided for filing a Brief in Opposition, and accordingly, the Commission's brief was due on or before August 9, 1978 (see Appendix "A").

By letter of date August 8, 1978, reproduced as Appendix "B" and attached hereto, the Solicitor General on behalf of the Commission as respondent, requested under Rule 34 (5)[2] of the Supreme Court Rules, an extension of time to and including August 30, 1978, within which to file the Commission's response. At that time, Superior had and made no objection to the Solicitor General's request.

By letter of August 9, 1978, reproduced as Appendix "D" and attached hereto, the Honorable Michael Rodak, Jr., Clerk of the Supreme Court, pursuant to the provisions of Rule 34 (5),[2] granted the Solicitor General's request for the extension of time to August 30, 1978, and further advised him that no further extension of time would be granted by the clerk to file the Brief in Opposition. Again, Superior had and made no objection to the granting of the request.

Yet, without any apparent explanation or notice to the Petitioner, the Commission's Brief in Opposition dated simply "September, 1978", was not in fact filed until after the filing deadline of August 30, 1978 had passed. Superior's counsel was first informed by long distance telephone by personnel of the Supreme Court Clerk's office that the actual filing date of the Commission's Brief in Opposition was September 5, 1978. (See also Appendix "E" attached hereto.)

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[2] Reproduced as Appendix "C" hereto.

Inarguably, the rules[3] of the Court must be applied even-handedly to all litigants before it, and when first the rules themselves and then the good offices of the Clerk of the Court are both utilized to extend the filing date a total of forty-one days beyond the thirty-day filing time required of an ordinary respondent (i.e., other than the United States or an agency thereof), then Superior is of the opinion that the Court's rules have been inexplicably ignored and that Superior's rights as a party litigant before the Court would be adversely affected if the rules are not enforced in this instance.

Accordingly, Superior hereby moves that the Commission's Brief in Opposition be suppressed and given no consideration whatever by the Supreme Court in reviewing Superior's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit previously filed in this proceeding.

REPLY TO BRIEF IN OPPOSITION

In the alternative, if Superior's Motion to Suppress is denied, then Superior makes the following reply to the Commission's Brief in Opposition:

ARGUMENT

Both the Commission (Respondent's Brief, page 6) and the Fifth Circuit Court of Appeals (Petitioner's Appendices, A-7 to A-8) are apparently of the impression that the substantial modification in the Commission's replacement contract policy as first enunciated by the Commission in Opinion 770-A issued November 5, 1976, was merely *interpretative* of the Commission's replacement contract policy and was not a *substantive* change. Superior, on the

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[3] U.S. Sup. Ct. Rules, 28 U.S.C.A.

other hand, has consistently contended (Petitioner's Petition, page 27) that until the issuance of Opinion 770-A, each pronouncement of the Commission's replacement contract policy had been consistent (i.e., Opinion Nos. 639, 699-H and 770), for all required that the base contract "expire by its own terms" or "of its own terms", with the emphasis being on the original contractual provisions of the base agreement including the running of a primary term (if stated and identified as such) if, as and when required by such provisions (i.e., where the term provisions of a contract are not modified by the words ". . . *unless terminated as elsewhere herein provided* . . ." as they are in the case at hand). In keeping with this position, Superior has consistently maintained that when Opinion 770-A issued on November 5, 1976 it contained a *substantive* change (i.e., the requirement that the full primary term of the original gas sales contract must run, unaffected by any so-called *"premature termination provisions"*) and therefore the Commission, before legally effecting this substantive change, was required to comply with the Administrative Procedure Act (APA).[4] The Commission has not done so and therefore the Commission orders complained of here are not valid. Prior to Opinion 770-A the Commission's replacement contract policy required only that the original gas sales contract "expire by its own terms" or "of its own terms". The labeling of the new requirements for such policy in Opinion 770-A as merely "interpretative" or "explanatory" does not change the substantive effect the new requirements of the policy have not only on Superior, but on the entire industry as well.

As Judge Theis observed in *Energy Reserves Group* v. *Federal Energy Administration,* 447 F.Supp. 1135 (Janu-

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[4] 5 U.S.C. § 553

ary 26, 1978, U.S. District Court, D. Kansas) with reference to the Federal Energy Administration:

> "Although the FEA has authority to issue guidelines having the force and effect of law, this does not mean every regulation promulgated by the FEA is substantive. 'That agency activity falls within the permissible scope of statutory authority does not alone answer the question of the applicability of Section 4' [of the Administrative Procedure Act]. *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90 (D.D.C.1967). The label attached to a ruling by the enacting agency, the procedures utilized to promulgate it, and the practical effect given such ruling in further agency proceedings relevant thereto, are all factors indicative of whether a rule is interpretative or substantive. If the FEA intends a rule to be substantive, it is required to label it as such and utilize APA notice and comment procedures necessary to render the final guideline legally effective. See 15 U.S.C. § 757(i)(1). A substantive guideline promulgated without resort to such procedures is invalid." (Opinion at 1143.)
>
> "A final important consideration in determining whether a rule is interpretative or substantive in nature is the extent of its impact upon the regulated industry. If a rule or order, no matter how labeled by the agency, has an immediate and significant impact upon a regulated industry or an important class of members of products of that industry prior to a chance for a full hearing upon the merits of the policy espoused in the rule, then notice and an opportunity for comment are required. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, supra; *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972); *Texaco* v. *Federal Power Commission*, 412 F.2d 740 (3rd Cir. 1969); *Pharmaceutical Manufacturers Assoc.* v. *Finch*, 307 F.Supp. 858, 863 (D.Del.1970); *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90 (D.D.C. 1967)." (Opinion at 1146.)

> "Upon the basis of the substantive effect given Ruling 1974-29 in subsequent proceedings before the FEA, and the substantial effect it has upon plaintiffs prior to any chance for presentation of evidence or hearing upon the merits of the ruling, the Court finds Ruling 1974-29 to be a substantive rather than an interpretative order. Because Ruling 1974-29 was promulgated by the FEA without notice or opportunity for comment, it is void and ineffective to affect the rights of plaintiffs herein. See *Morton* v. *Ruiz*, 415 U.S. 199, 39 L.Ed. 2d 270, 94 S.Ct. 1055 (1974)." (Opinion at 1147.)

The Court is respectfully requested to take judicial notice of the fact that regulations are pouring forth from various administrative agencies of the federal government at a heretofore unprecedented rate. If our society, complex and inter-dependent as it has become, is to progress and function under the rule of law, every citizen and every industry must be afforded the protection of the Administrative Procedure Act as Congress most surely must have intended.

The Commission not only has failed to comply with the Administrative Procedure Act in making a substantive change in the replacement contract policy, but has sought to do so retroactively, as Superior's July 17, 1953 contract had already terminated in accordance with its own terms at the time Opinion 770-A issued on November 5, 1976.

Furthermore, Superior does not here dispute the Commission's authority to require the continuation of dedicated service to the interstate market under the Natural Gas Act and consequently the references to (Respondent's Brief, page 9) to *California* v. *Southland Royalty Co.*, No. 76-1114, decided May 31, 1978 and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 are not apposite.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE SUPERIOR OIL COMPANY

W. B. WAGNER, JR.
General Counsel

JAMES M. DUNNAM
Attorney
P. O. Box 1521
Houston, Texas 77001

Attorneys for
The Superior Oil Company

By .....
James M. Dunnam

September 18, 1978

CERTIFICATE OF SERVICE

This Petitioner's Motion to Suppress and Reply to Respondent's Brief in Opposition has been served on counsel of record for the Federal Energy Regulatory Commission in accordance with Rule 33(1) of the Supreme Court Rules on or before the 20th day of September, 1978, and upon the Solicitor General of the United States in accordance with Rule 33(2)(a) of said rules by the undersigned attorney who was duly admitted to practice before the Supreme Court of the United States on June 1, 1976.

.....
James M. Dunnam
Attorney for Petitioner

APPENDIX "A"

UNITED STATES SUPREME COURT RULE NO. 24

Rule 24. Brief in opposition—reply—supplemental briefs

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33. In cases where the United States or any agency, officer or employee thereof is the respondent, the respondent shall have an additional twenty days to file the said opposing brief.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file, or upon the actual filing of such brief in a shorter time, the petition and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling

attention to new cases or legislation or other intervening matter not available at the time of his last filing.

As amended Nov. 22, 1971.

APPENDIX "B"

SEAL

OFFICE OF THE SOLICITOR GENERAL
Washingon, D.C. 20530
August 8, 1978

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Superior Oil Co. v. Federal Energy Regulatory Commission, No. 77-1800

Dear Mr. Rodak:

The petition for a writ of certiorari in the above case was filed on June 20, 1978, and was served on the government the same day. The government's response is therefore due on August 9, 1978. We respectfully request, under Rule 34(5) of the Rules of the Court, an extension of time to and including August 30, 1978, within which to file the government's response.

A draft response has been prepared and the additional time is needed to complete review and editing and printing.

Sincerely,

WADE H. McCREE, JR.,
Solicitor General

cc: W. B. Wagner, Jr., Esquire
P.O. Box 1521
Houston, Texas 77001

RECEIVED
AUG 11 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department

APPENDIX "C"

UNITED STATES SUPREME COURT RULE NO. 34

Rule 34. Computation and enlargement of time

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper must be presented and served upon all other parties as provided in Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. All applications for extensions of time to file briefs, motions, appendices or other papers, to designate parts of records for printing in appendices, or otherwise to comply with time limits provided by these rules, except applications for extensions of time to file petitions for certiorari, to docket appeals, to petition for rehearings or to issue mandates shall in the first instance be acted upon by the clerk, whether addressed to him, to the court or to a justice. Any party aggrieved by the clerk's action on such application may request that it be submitted to a justice or to the court.

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

August 9, 1978

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Re: The Superior Oil Company v. Federal Energy Regulatory Commission, No. 77-1800

Dear Mr. McCree:

Your request of August 8, 1978, for an extension of time within which to file the Government's response to the petition for a writ of certiorari in the above-entitled case is granted, and the time has been extended to and including August 30, 1978.

No further extension of time will be granted by the Clerk to file this brief.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: James M. Dunnam, Esq.
P. O. Box 1521
Houston, Texas 77001

RECEIVED
Aug. 11, 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department

APPENDIX "E"

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1800

The Superior Oil Company,

Petitioner,

v.

Federal Energy Regulatory Commission.

Service of five copies of Brief for the Federal Energy Regulatory Commission in opposition, is acknowledged this 11th day of September, 1978.

s/ JAMES M. DUNNAM
W. B. Wagner, Jr.
James M. Dunnam

Air Mail: Sept 5, 1978

Note: Please date, sign and
return this acknowledgment to:

OFFICE OF THE SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20530

RECEIVED
Sept. 11, 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department